Supreme Court, U.S.
FILED
APR 6 1998
CLERK

(2)

No. 97-1280

In the Supreme Court of the United States

OCTOBER TERM, 1997

KAWERAK REINDEER HERDERS ASSOCIATION, INC.,
PETITIONER

v.

THOMAS E. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
E. ANN PETERSON
JAMES EICHNER
JUDITH RABINOWITZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the Reindeer Industry Act of 1937, 25 U.S.C. 500 *et seq.*, bars a non-Native Alaskan from importing Canadian reindeer into Alaska for private commercial purposes.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Labs.*, 351 U.S. 292 (1956)	8
California v. *Rooney*, 483 U.S. 307 (1987)	7-8
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Karmun v. *Commissioner*, 749 F.2d 567 (9th Cir. 1984), cert. denied, 474 U.S. 819 (1985)	3
Reindeer Herders Ass'n v. *Ceasar*, No. A91-511CV (D. Alaska filed Oct. 22, 1991)	4
Williams v. *Norris*, 25 U.S. (12 Wheat.) 117 (1827)	8
Yee v. *City of Escondido*, 503 U.S. 519 (1992)	8

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause)	6
Reindeer Industry Act of 1937, 25 U.S.C. 500 *et seq.*:	
25 U.S.C. 500	2
25 U.S.C. 500a	2
25 U.S.C. 500b	3
25 U.S.C. 500f	2, 8
25 U.S.C. 500g	3, 8-9
25 U.S.C. 500i	3, 4
25 U.S.C. 500m	2
Sup. Ct. R.:	
Rule 10	9
Rule 14.1(a)	8

Miscellaneous: Page

F. Cohen, *Handbook of Federal Indian Law* (1942) 2

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1280

KAWERAK REINDEER HERDERS ASSOCIATION, INC., PETITIONER

v.

THOMAS E. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 115 F.3d 657. The order of the district court (Pet. App. 27a-32a) is unreported. The opinion of the Interior Board of Indian Appeals (Pet. App. 33a-76a) is reported at 23 I.B.I.A. 28.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1997. A petition for rehearing was denied on October 9, 1997. Pet. App. 77a-78a. On December 24, 1997, Justice O'Connor extended the time for filing the petition for a writ of certiorari to and including February 6, 1998. The petition was filed on February 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Reindeer Industry Act of 1937 (RIA), 25 U.S.C. 500 *et seq.*, to provide a "means of subsistence for the Eskimos and other natives of Alaska" by establishing, through federal acquisition and oversight, a "self-sustaining" Native reindeer industry. 25 U.S.C. 500. The United States first introduced Siberian reindeer into Alaska between 1891 and 1902, at the urging of Dr. Sheldon Jackson, the United States' General Agent in Alaska. The federal government took that step to "augment the dwindling source of native food supply consisting of game and fish, which had been seriously depleted by the whites." F. Cohen, *Handbook of Federal Indian Law* 410 (1942). In the decades that followed, non-Native Alaskans increasingly assumed control of reindeer production to the detriment of the Native Alaskan enterprises and economy. Congress enacted the RIA to invigorate and support the Native Alaskan reindeer industry.

The RIA directs the Secretary to acquire reindeer and related equipment "necessary to the effectuation of the purposes of this subchapter" and to manage the reindeer thus acquired in a manner that "maintain[s] for said natives of Alaska a complete and self-sustaining economy." 25 U.S.C. 500a, 500f.[1] The RIA also authorizes the Secretary to promulgate regulations necessary to carry out the Act, including regulations for the use of public lands in Alaska for grazing of reindeer. 25 U.S.C. 500f, 500m.

---

[1] Contrary to petitioner's suggestion (Pet. 6), the RIA did not direct the Secretary to acquire all reindeer and reindeer facilities in Alaska.

The RIA also imposes restrictions on the alienation of any government-owned or Native-owned reindeer in Alaska. 25 U.S.C. 500i. The sale or transfer of reindeer to non-Natives is allowed only upon consent of the Secretary and on condition that they "either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory." *Ibid.* In addition, no title to reindeer or reindeer products owned by the United States on behalf of Natives, or by Natives outright, is transferrable except in conformity with regulations promulgated by the Secretary for the purposes of "preserving the native character of the reindeer industry or business in Alaska." *Ibid.* Non-Natives who own reindeer in Alaska are required to file declarations of ownership with an authorized agent of the Secretary or be "barred thereafter from asserting [their] claim of title." 25 U.S.C. 500b.[2]

2. In 1986, private respondent Thomas E. Williams, a non-Native resident of Alaska, requested an opinion from the Juneau Area Director of the Bureau of Indian Affairs on whether the RIA would prohibit his proposed importation of Canadian reindeer into Alaska for private commercial purposes. The Area Director referred the matter to the Regional Solicitor, who concluded that the RIA does not prohibit a non-Native from importing reindeer from outside of Alaska. Pet. App. 39a-40a. The Regional Solicitor

---

[2] In 1986, Congress amended Section 500g of the Act in response to *Karmun* v. *Commissioner*, 749 F.2d 567 (9th Cir. 1984), cert. denied, 474 U.S. 819 (1985), to clarify that Native income derived from the sale of trust reindeer or reindeer products is not subject to federal income taxation.

reasoned that the RIA's restrictions on alienation, which apply to government-owned or Native-owned "[l]ive reindeer in Alaska, and the increase thereof," 25 U.S.C. 500i, do not "expressly prohibit prospectively the importation of reindeer from outside the State." Pet. App. 40a-41a. Thereafter, Williams reported to the Area Director that he had imported 19 reindeer from Canada and that they were owned by a corporation named Alaska Reindeer, Inc. *Id.* at 42a.

In 1989, the Area Director asked the Regional Solicitor to reconsider his earlier opinion. Pet. App. 43a. The Regional Solicitor adhered to his prior reasoning that the RIA does not prohibit non-Natives from importing reindeer. *Id.* at 43a-46a. He emphasized that there is "no express provision of the Act which appears to have been violated by Mr. Williams' importation and ownership of Canadian reindeer" and "no particular ambiguity on the face of the statute which would require us to refer to the legislative history as an aid to interpretation on the point in question." *Id.* at 44a-45a. The Regional Solicitor further explained that the Act's purposes "have not been seriously threatened thus far by the allowance of non-Native importation of non-Alaskan reindeer." *Id.* at 45a.

3. Petitioner, an unincorporated association of 17 Native reindeer herders, filed suit in district court challenging the Regional Solicitor's interpretation of the RIA. *Reindeer Herders Ass'n* v. *Ceasar*, No. A91-511CV (D. Alaska filed Oct. 22, 1991). Petitioner ultimately agreed to dismiss that suit and to pursue an administrative appeal before the Interior Board of Indian Appeals (IBIA). Pet. App. 48a. The Area Director entered a decision explicitly adopting and following the Regional Solicitor's opinions. Petitioner

then filed its administrative appeal. The IBIA reversed the Area Director's decision. *Id.* at 33a-76a.

The IBIA stated that the Area Director's decision was not unreasonable because "no provision in the Reindeer Act explicitly prohibits the importation of reindeer into Alaska or explicitly precludes a non-Native from entering the reindeer business, using imported reindeer." Pet. App. 55a. It nevertheless concluded that, under the canons of construction pertaining to Indian legislation, "an interpretation of a statute, even though reasonable, must be rejected if another interpretation is possible, which is more favorable to the Native beneficiaries." *Id.* at 55a-56a. The IBIA ultimately concluded that the "lack of any explicit provision concerning this matter, in the face of the overall purpose expressed in the Act," created an ambiguity that had to be resolved in favor of the Native herders. *Id.* at 71a-72a.

4. Private respondent Williams sought review of the IBIA's decision in the United States District Court for the District of Alaska. The district court upheld the IBIA's ruling. Pet. App. 27a-32a. The court concluded that the IBIA's decision was reasonable and, because it represented the decision of the Secretary of the Interior, was entitled to deference, *id.* at 29a-30a. The court found Williams' constitutional challenges unpersuasive. *Id.* at 30a-31a.

5. The court of appeals reversed the district court's judgment. The court began its analysis, "as did the Regional Solicitor, by noting the Reindeer Act does not by its terms guarantee Alaskan natives a monopoly in the reindeer business." Pet. App. 7a. The court found that the RIA's grant of assistance to Native reindeer enterprises creates substantial competitive obstacles for non-Native reindeer producers.

Id. at 7a-8a. It concluded, however, that "nothing in the Act actually prohibits non-natives from entering the Reindeer business if they can overcome all these obstacles." *Id.* at 8a.

The court of appeals also looked, however, beyond the plain language of the RIA and considered a number of non-textual factors, including the question whether "a court is bound to defer to an agency's interpretation where the interpretation raises difficult constitutional questions." Pet. App. 11a. The court of appeals discussed that issue at some length, expressing concern that the IBIA's construction would raise serious equal protection issues under the Due Process Clause of the Fifth Amendment. *Id.* at 11a-21a. The court ultimately concluded that "[t]he constitutional questions raised by the IBIA's interpretation are grave" and that there is "no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available." *Id.* at 21a.

Judge Brunetti concurred. Pet. App. 22a-26a. He concluded that, "[b]ecause the plain language of the statute does not support the district court's upholding of the IBIA's interpretation of the statute, it is not necessary to resort to legislative history to determine the propriety of that interpretation or to resolve constitutional questions posed by the same." *Id.* at 22a.

ARGUMENT

Petitioner urges this Court to review this case to decide a series of constitutional questions respecting the RIA and other laws affecting Native Americans. See Pet. i. Those constitutional issues, however, are not presented in this case. The court of appeals

decided a narrow statutory issue: Whether the RIA bars a non-Native Alaskan from importing Canadian reindeer into Alaska for private commercial purposes. The court concluded that it does not. The court's decision has limited importance, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is accordingly not warranted.

1. The court of appeals examined the text of the RIA and concluded that "nothing in the Act" prohibits non-Native Alaskans from importing Canadian reindeer into Alaska for commercial purposes. Pet. App. 8a. The court determined, however, that it should also consider pertinent canons of statutory construction, including the general principles that a court owes deference to an agency's construction of a statute that it administers, that a court should interpret statutes enacted for the benefit of Native Americans in favor of their interests, and that a court should construe statutes, if possible, to avoid serious constitutional questions. *Id.* at 8a-11a. The court of appeals concluded that the combined application of those principles also supported its ultimate judgment that the RIA does not prohibit non-Native Alaskans from importing Canadian reindeer into Alaska. *Id.* at 21a.

The court of appeals' opinion makes reference to potential constitutional concerns, but its judgment decides only the statutory question of whether the RIA prohibits a non-Native from importing reindeer. The court of appeals did not squarely decide any constitutional issue. There is accordingly no warrant for this Court to review petitioner's proposed issues of constitutional law. As this Court has repeatedly stated, it "reviews judgments, not state-

ments in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827).

2. The questions that petitioner presents for review do not include the specific issue of statutory construction that the court of appeals actually decided. See Pet. i. It is not this Court's usual practice to consider issues other than those that a petitioner actually puts forward for review. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("we ordinarily do not consider questions outside those presented in the petition for certiorari"); Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). In any event, the statutory question would not warrant review by this Court.

The court of appeals' ruling decides a novel issue under the RIA that has not been addressed by any other court of appeals. The RIA affects relatively few people in a single State who engage in an industry—reindeer herding—that does not have nationwide significance. The record in this contains no evidence that private respondent's decade-old reindeer enterprise has had any practical impacts on petitioner's operations. Pet. App. 45a-46a. And even if concerns over those practical impacts should arise, the RIA empowers the Secretary of the Interior to take various actions in support of Native reindeer enterprises and thereby mitigate adverse consequences.[3]

---

[3] See 25 U.S.C. 500f (authorizing the Secretary to provide managerial support for the Native reindeer industry); 25

This case accordingly does not satisfy any of this Court's usual criteria for review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
E. ANN PETERSON
JAMES EICHNER
JUDITH RABINOWITZ
Attorneys

APRIL 1998

U.S.C. 500g (authorizing the Secretary to distribute reindeer and other property to Natives).